

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Monty R. Sinner,
Petitioner

v.
East Central School District, No. 2580,
Respondent.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this matter on September 22, 2006, at the Sandstone City Hall, 119 4th Street, Sandstone, MN 55072. The OAH hearing record closed on October 13, 2006, when all of the parties' post-hearing submissions were received.

Tammy P. Freiderichs, Friederichs & Thompson, P.A., 1120 E. 8th St., Suite 106, Bloomington, MN 55420, appeared on behalf of Monty Sinner (Petitioner or Mr. Sinner). Margaret A. Skelton, Ratwik, Roszak & Maloney, P.A., 300 U.S. Trust Building, 730 Second Avenue S., Minneapolis, MN 55402, appeared on behalf of the East Central School District No. 2580 (Respondent or School District).

STATEMENT OF ISSUES

1. Did the Petitioner agree that a hearing before a single arbitrator that was conducted on January 3, 2006, would serve both as a grievance arbitration hearing in accordance with his collective bargaining agreement and also as a hearing on his claim under the Veteran's Preference Act¹ that the School District had failed to establish incompetency or misconduct to justify his removal from his position as a school bus driver?

2. Did the award the arbitrator entered following the January 3, 2006, hearing adjudicate the Petitioner's Veterans Preference Act claim that the School District had failed to establish incompetency or misconduct to justify his removal from his position as a school bus driver?

The Administrative Law Judge concludes that during the January 3, 2006, hearing, the Petitioner acquiesced to having the arbitrator hear his Veterans' Preference Act claim at that hearing. However, because the arbitrator's award

¹ Minn. Stat. § 197.46. Unless otherwise specified all references to Minnesota Statutes are to the 2004 edition.

did not include an adjudication of the Petitioner's Veterans Preference Act claim, that hearing did not meet the requirements of Minn. Stat. § 197.46.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mr. Sinner currently lives at 55221 Trapp Lane, Sandstone, Minnesota 55072.² He served on active duty in the United States Marine Corps from February 2, 1953 to February 1, 1961. His military service was honorable.³

2. In 2001, the School District employed the Petitioner as a school bus driver.⁴ He continued to be employed in that capacity until the School District terminated his employment on February 22, 2005. During the second year of that employment he was promoted to lead school bus driver.⁵

3. The School District is a political subdivision of the state. Certain of the School District's employees, including the Petitioner, are members of a bargaining unit represented by AFSCME Local 2580 (the Union).⁶ When the matters at issue in this proceeding arose, there was a collective bargaining agreement between the School District that included a grievance process. Under that process, grievances that the School District and Union were unable to resolve informally were required to be submitted to a single arbitrator jointly selected by the parties.⁷

4. On the afternoon of January 24, 2004, Petitioner was driving a school bus on his usual after-school route. As he was beginning to proceed through a railroad crossing at the northern edge of Sandstone, crossing warning bells and flashers began to operate. Petitioner decided to back up the bus. As the bus was backing up, the crossing arm came down on the bus. Petitioner stopped and waited for the train to pass. After the train passed, Petitioner drove across the crossing and completed his route.⁸

5. The incident that occurred on January 24, 2004, was reported to the School District's Superintendent. On February 10, 2005, the School District suspended the Petitioner pending an investigation.⁹ After the School District

² Ex. 14.

³ DD Form 214 attached to Ex. 14.

⁴ Ex. A.

⁵ Testimony of Monty Sinner.

⁶ *Id.*

⁷ Testimony of Teresa Joppa.

⁸ Exs. 12 and T. Some of the exhibits are duplicated. Because the hearing record refers to different exhibit numbers that pertain to the same document both exhibit numbers are referred to in this report.

⁹ Ex. B.

completed its investigation it terminated the Petitioner's employment on February 22, 2005 for unsafe driving.¹⁰

6. After the School District terminated the Petitioner's employment, the Petitioner consulted with Dean Dronen, Pine County's Veterans Service Officer, regarding his veterans preference rights.¹¹ Thereafter, Mr. Dronen gave the Petitioner advice about those rights and helped him prepare a letter to the School.¹² That letter, which the Petitioner sent to the School District on April 18, 2005, stated in part:

1. I am not resigning my position as bus driver.
2. I am requesting a veteran's preference hearing.
3. I disagree with the accusation of misconduct and incompetence.

I feel I should have had the opportunity to address the school board to explain what happened prior to termination. Therefore in accordance with Minnesota Statutes 197.46 you are required to provide a hearing involving a panel of 3 people.¹³

7. In addition to seeking relief under the Veterans Preference Act, Mr. Sinner also filed a grievance pursuant to his collective bargaining agreement challenging the School District's termination of his employment. The Union assigned Char Brink, a staff representative with AFSCME Council #65, to represent the Petitioner in connection with that grievance.¹⁴ By letter dated May 2, 2005, Ms. Brink informed the School District that the Union intended to arbitrate Petitioner's grievance and attached a request for an Arbitrator Panel.¹⁵

8. No civil service board or commission or merit system authority governed the School District personnel policies and procedures. Minn. Stat. § 197.46 provides, in part, that "[w]here no such civil service board or commission or merit system authority exists, such hearing shall be held by a board of three persons appointed as follows: one by the governmental subdivision, one by the veteran, and the third by the two so selected.

9. On May 4, 2005, Kevin J. Rupp, the School District's counsel, advised the Petitioner that the School District had received his request for a Veterans' Preference Hearing and that Petitioner's attorney should contact

¹⁰ Exs. 1 and D.

¹¹ Testimony of Dean Dronen.

¹² Testimony of D. Dronen; Ex. 2 and E.

¹³ Exs. 2 and E.

¹⁴ Testimony of M. Sinner and Teresa Joppa

¹⁵ Exs. 3 and G; Testimony of T. Joppa.

Mr. Rupp with the name of an individual of his choosing to be a member of the three board panel.¹⁶

10. In a May 16, 2005, discussion with Ms. Brink, Mr. Rupp asked her if the Petitioner would agree to a combined hearing. Ms. Brink said she did not know.¹⁷

11. Sometime prior to May 17, 2005, Mr. Rupp and Ms. Brink jointly selected Nancy Powers, an arbitrator on the list maintained by the Minnesota Bureau of Mediation Services, to arbitrate the grievance Mr. Sinner was asserting against the School District under the collective bargaining agreement. Thereafter, Mr. Rupp and Ms. Brink planned to communicate with each other to set a mutually agreeable date for the grievance arbitration.¹⁸

12. By letter dated May 17, 2005, Mr. Rupp advised Ms. Powers, of her selection as arbitrator. He also informed her that the parties had agreed to have her preside over a combined hearing on the grievance and on Mr. Sinner's veterans preference claim and to allow her to decide both matters.¹⁹ Mr. Rupp sent a copy of that letter to the School District's Superintendent but sent no copies to Petitioner or to Ms. Brink.²⁰

13. On July 28, 2005, Mr. Rupp wrote Ms. Brink advising her that he had been experiencing difficulty contacting her regarding the scheduling of a combined arbitration and Veterans' Preference hearing for Petitioner. He asked her to advise him as soon as possible when the Union would be available for a combined hearing.²¹

14. Subsequently, Mr. Rupp and Ms. Brink agreed to schedule the hearing on Tuesday, October 18, 2005. On August 30, 2005, counsel for the School District wrote to the Arbitrator confirming that hearing date. That letter referred to its subject as: "Grievance Arbitration and Veterans' Preference Hearing" However, the first two lines of the letter read:

This letter confirms the arbitration for the above-referenced grievance will be held on Tuesday, October 18, 2005, at 0:00 a.m. Ms. Brink, the union representative, agreed the arbitration hearing should take place in the board room at the district office.²²

Mr. Rupp did not send a copy of that letter to Petitioner.

¹⁶ Exs. 4 and F

¹⁷ Testimony of K. Rupp.

¹⁸ Testimony of T. Joppa.

¹⁹ Exs. 5 and H.

²⁰ Exs. 5 and H.

²¹ Exs. 6 and I; Testimony of Kevin Rupp.

²² Exs. 7 and J; Testimony of K. Rupp.

15. By letter dated August 31, 2005, the School District advised the Petitioner that his Veterans' Preference Hearing was scheduled for Tuesday, October 18, 2005.²³

16. By letter dated September 13, 2005, the School District advised the Petitioner that the AFSCME grievance hearing would be held at the same time and before the same hearing officer as previously scheduled for the Veterans' Preference Hearing.²⁴

17. After the Petitioner received the School District's September 13, 2005, letter, he was aware that the October 18, 2005, hearing was scheduled to be a combined grievance and veterans preference hearing, he acquiesced to having a combined hearing. However, although the Petitioner was comfortable about having Ms. Brink represent him in his Union grievance, he wished to have his son, Mike Sinner, represent him in connection with his veterans preference claim because his son had had prior experience with veteran's preference hearings. The Petitioner arranged for his son to be present at the October 18, 2005, hearing in order to represent him in connection with his veterans preference claim.²⁵

18. On October 18, 2005, the Petitioner was willing to go forward with a combined grievance and veterans preference hearing. However, before the hearing began the parties engaged in settlement discussions.²⁶ As a result of those discussions, the parties reached a tentative settlement agreement and canceled the hearing.²⁷ Those settlement discussions included Mr. Rupp, as attorney for the School District, Char Davis, the District's support services supervisor, the Petitioner, his son, and Ms. Brink.²⁸ During the discussions, Petitioner received a three-ring binder of the School District's evidence.²⁹

19. Sometime after October 18, 2005, Mr. Sinner withdrew his earlier acceptance of the tentative settlement agreement.³⁰ Thereafter, there were discussions between Mr. Rupp, Ms. Brink, Theresa Joppa, an AFSCME staff attorney, and Arbitrator Powers regarding rescheduling the hearing. Mr. Sinner was not a party to those discussions, and neither the School District nor the Union solicited Mr. Sinner's views about a new hearing date.

20. As a result of those discussions, Mr. Rupp, Ms. Brink, Theresa Joppa, an AFSCME staff attorney, and Arbitrator Powers all agreed to reschedule the combined grievance arbitration and veterans preference hearing

²³ Exs. 8 and K; Testimony of M. Sinner.

²⁴ Exs. 9 and L.

²⁵ Testimony of M. Sinner; Testimony of Mike Sinner.

²⁶ Testimony of M. Sinner.

²⁷ Testimony of K. Rupp.

²⁸ Testimony of M. Sinner.

²⁹ Testimony of M. Sinner.

³⁰ Testimony of K. Rupp and M. Sinner.

to January 3, 2006, at 9:00 a.m. at the same location. That agreement was memorialized in a letter dated December 27, 2005. A copy of that letter was not sent to the Petitioner.³¹

21. On or about December 27, 2005, Ms. Brink informed the Petitioner of the new hearing date. The Petitioner then called his son, who indicated he was unavailable on that date.³² Petitioner then called Ms. Brink, informed her that his son could not be present at a January 3, 2006, hearing, and requested that the hearing be postponed. Ms. Brink told Petitioner that the Union would have to pay the arbitrator's fee if Petitioner did not appear, and he acquiesced to the January 3rd date.³³

22. When Ms. Brink informed the Petitioner of the January 3rd hearing date, she also told him that she had never previously represented a union member in a veterans preference hearing. Because of what had been occurring, the Petitioner and his son concluded that Ms. Brink would not be able to provide the Petitioner with adequate representation for his veterans preference claim on January 3rd.³⁴ The Petitioner therefore attempted to obtain legal counsel to represent him at the January 3rd hearing, but was unable to do so because of the short notice.³⁵

23. On January 3, 2006, the Petitioner understood that his grievance and veterans preference claims hearing would be addressed separately but contemporaneously at the same hearing.³⁶ Petitioner never gave Ms. Brink or any other union representative of the Union authority to represent him with his veteran's preference claims.³⁷

24. Arbitrator Powers conducted an arbitration hearing on January 3, 2006.³⁸ Ms. Brink was half an hour late arriving at the hearing. Before she arrived, the Petitioner told the Arbitrator he did not have a representative for the veteran's preference hearing, and he attempted to give Arbitrator Powers a written statement that his son had previously prepared. The statement was titled "Veterans Preference/Arbitration Hearing." Ms. Powers declined to accept the written statement indicating that it was Ms. Brink's role to tender any written submissions relating to the proceeding.³⁹

25. Prior to the hearing, the Petitioner did not wish to have his veterans preference claim heard on January 3, 2006, when his son was not available to assist him, nor did the Petitioner wish to have Ms. Brink represent him with

³¹ Exs. 10 and N.

³² Testimony of Mike Sinner.

³³ Testimony of M. Sinner.

³⁴ Testimony of M. Sinner and Mike Sinner.

³⁵ Testimony of M. Sinner.

³⁶ Testimony of M. Sinner.

³⁷ Testimony of M. Sinner.

³⁸ Exs. 12 and T.

³⁹ Testimony of M. Sinner; Exs. 11 and O; Testimony of Mike Sinner.

respect to that claim. However, the Union pressured him to have both his grievance and his veterans preference claims heard on that date and to allow Ms. Brink to represent him in connection with both claims. Responding to that pressure, the Petitioner acquiesced to allowing Arbitrator Powers to hear both claims on January 3, 2006, and to allow Ms. Brink to represent him in connection with both claims.⁴⁰

26. After Ms. Brink arrived, Ms. Powers, as a single arbitrator, proceeded to conduct the hearing. In his opening statement for the School District, Mr. Rupp expressly indicated that the hearing was “a combined hearing involving a grievance arbitration under the collective bargaining agreement and a Veterans Preference hearing under Minnesota’s Veterans Preference Act, and that two issues were being submitted for the Arbitrator to determine, namely:

1. Whether the District disciplined Monty Sinner for just cause pursuant to Art. 15, Section 1 of the collective bargaining agreement?
2. Whether Mr. Sinner engaged in misconduct authorizing the District to remove him from his position pursuant to Minn. Stat. 197.46?⁴¹

27. The Arbitrator issued a written award on February 22, 2006.⁴² The Arbitrator’s statement of issues only identifies one issue: “Did the employer have just cause to terminate Grievant?”⁴³ The Arbitrator’s award also addresses only one of the proceedings: “The grievance is denied.”⁴⁴ The award does not address whether the Petitioner was incompetent or engaged in misconduct within the meaning of Minn. Stat. § 197.46.⁴⁵ The arbitration award also does not state that Petitioner waived his right to the hearing described in Minn. Stat. § 197.46.

28. Ms. Powers issued her arbitration award on February 22, 2006, and served copies of it on Mr. Rupp and Ms. Brink. Ms. Powers’ award was delivered to the School District and Ms. Brink on February 27, 2006. Neither Ms. Powers, Mr. Rupp, nor Ms. Brink transmitted a copy of the arbitration award to the Petitioner prior to March 13, 2006.⁴⁶

29. Sometime in early March 2006, Mr. Sinner called the Union and inquired whether Ms. Powers had issued an award. Union staff advised him that the Union had, in fact, received an award relating to his proceeding. Thereafter,

⁴⁰ Testimony of M. Sinner and K. Rupp.

⁴¹ Ex. Q; Testimony of K. Rupp.

⁴² Exs. 12 and T.

⁴³ Exs. 12 and T at p. 2.

⁴⁴ *Id.* at p. 9.

⁴⁵ Exs. 12 and T.

⁴⁶ Exs. 12 and T; testimony of M. Sinner.

the Union sent a copy of Ms. Powers' award to the Petitioner, which he received on March 13, 2006.⁴⁷

30. Neither the School District, the Union, nor the Petitioner made application to Arbitrator Powers for modification or correction of her award within 20 days following February 27 or March 13, 2006.

31. Neither the School District, the Union, nor the Petitioner made application to a court of competent jurisdiction to either confirm or vacate Arbitrator Powers' award within 90 days following February 27 or March 13, 2006.

32. After receiving a copy of Ms. Powers' award, the Petitioner again consulted with Mr. Dronen, who advised him that he might not have been accorded his rights under the Veterans Preference Act.⁴⁸ On April 4, 2006, Petitioner wrote to the Minnesota Department of Veterans Affairs (the Department) asserting that he had not been provided with a veteran's preference hearing.⁴⁹ Thereafter, the Department provided the Petitioner with the forms required to file a Petition for Relief.

33. On April 28, 2006, the Petitioner filed a Petition for Relief with the Department. Thereafter, the Department issued a Notice of Hearing, and this contested case proceeding ensued.

34. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

35. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

36. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law⁵⁰ gives the Administrative Law Judge and the Commissioner authority to consider the issues raised in this contested case

⁴⁷ Testimony of M. Sinner.

⁴⁸ Testimony of M. Sinner; Testimony of D. Dronen.

⁴⁹ Ex. 13.

⁵⁰ Minn. Stat. §§ 14.50, 197.46, 197.481.

proceeding and to make findings, conclusions, recommendations, and orders regarding those issues, as appropriate.

2. The Department of Veterans Affairs gave the parties proper and timely notice of the hearing, and it has also complied with all legal requirements for initiating and proceeding with this administrative contested case.

3. The Petitioner is an honorably discharged “veteran” within the meaning of the Veterans Preference Act,⁵¹ and he is entitled to any protections and benefits of that Act that may apply to him.

4. The School District is a political subdivision of the state within the meaning of the Veterans Preference Act,⁵² and its personnel practices are therefore subject to the provisions of that Act, except as may otherwise be provided by law.

5. The Petitioner timely filed a Petition for Relief with the Commissioner of Veterans Affairs pursuant to Minn. Stat. § 197.481.

6. On January 3, 2006, the Petitioner acquiesced to having a hearing on that date before Arbitrator Powers serve as a combined hearing on both the pending grievance under his collective bargaining agreement, and also his veterans preference claims against the School District.

7. The arbitration hearing that Arbitrator Powers conducted on January 3, 2006, in which the Petitioner and the School District were parties, was governed by the provisions of the Minnesota Arbitration Act, Minn. Stat. §§ 572.01 — .41.

8. Minn. Stat. § 572.16 provides:

Subdivision 1. **Application of party.** On application of a party, the arbitrator may modify or correct the award:

- (1) upon the grounds stated in section 572.20, subdivision 1;
- (2) for the purpose of clarifying the award; or
- (3) where the award is based on an error of law.

Subd. 2. **Submission by court.** If an application to the court is pending under section 572.18, 572.19, or 572.20, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in section 572.20, subdivision 1, or for the purpose of clarifying the award.

⁵¹ Minnesota Statutes, section 197.447.

⁵² Minnesota Statutes, section 197.46.

Subd. 3. **Procedure.** For purposes of subdivision 1 or 2, the application shall be made within 20 days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating that the opposing party must serve objections thereto, if any, within ten days from the notice. The award so modified or corrected is subject to the provisions of sections 572.18, 572.19 and 572.20.

9. Minn. Stat. § 572.20, subds. 1 and 2, provide:

Subdivision 1. **Modification of award.** Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Subd. 2. **Court disposition.** If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

10. The arbitration award that Arbitrator Powers issued on February 22, 2006, does not expressly include findings or conclusions about whether the Petitioner committed misconduct or was incompetent within the meaning of Minn. Stat. § 197.46.

11. The arbitration award that Arbitrator Powers issued on February 22, 2006, expressly included a final adjudication of the Petitioner's pending grievance under his collective bargaining agreement but did not expressly include a final adjudication of his veterans preference claims against the School District.

12. The exclusive processes, if any, for determining whether Arbitrator Powers intended her February 22, 2006, award to include a final adjudication of his veterans preference claims against the School District are applications to Arbitrator Powers or to a court of competent jurisdiction to modify or correct that

award pursuant to Minn. Stat. §§ 572.16 and 572.20 within the times prescribed by those statutes.⁵³

13. Except in proceedings conducted pursuant to Minn. Stat. §§ 572.16 and 572.20, extrinsic evidence is not admissible to determine an arbitrator's intent as to the terms of an award.⁵⁴ In the absence of such proceedings, the ALJ and Commissioner may only consider the express terms of Arbitrator Powers' award to determine whether her award adjudicated the Petitioner's claims under Minn. Stat. § 197.46.

14. The parties failed to apply to Arbitrator Powers or to a court of competent jurisdiction to modify or correct that the February 22, 2006, award pursuant to Minn. Stat. §§ 572.16 and 572.20 and within the times prescribed by those statutes.

15. Neither the Administrative Law Judge nor the Commissioner have jurisdiction to interpret, clarify, modify, or amend the terms of Arbitrator Powers' award to determine whether she finally adjudicated the Petitioner's claims under the Veterans Preference Act, as well as the Petitioner's pending grievance under the collective bargaining agreement.

16. Although the Petitioner may have acquiesced in allowing Arbitrator Powers to hear and consider his veterans preference claims against the School District during the January 3, 2006, hearing, she did not finally adjudicate those claims in her award. The Petitioner therefore remains entitled to a hearing in which the issue of whether he engaged in misconduct or was incompetent that justified his removal from his position is fully heard, considered, and adjudicated.

17. A veteran is entitled to a continuation of pay until properly discharged in accordance with the Veterans Preference Act.⁵⁵ Until the Petitioner receives a complete and effective hearing on his veterans preference claims, the Petitioner has not been properly removed from his position in accordance with Minn. Stat. § 197.46.

18. The Petitioner is therefore entitled to reinstatement to the position of school bus driver and to back pay beginning on February 22, 2005, and continuing until the School District has met all of the statutory requirements of the Veterans Preference Act, including offering him the opportunity for a hearing to determine whether his removal was based on misconduct or incompetence.

19. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

⁵³ *All Metro Supply, Inc. v. Warner*, 707 N.W.2d 1 (Minn.App. 2005).

⁵⁴ *Id.* at 5.

⁵⁵ *Pawelk v. Camden Township*, 415 N.W.2d 47, 51 (Minn.App. 1987).

20. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based on the Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully RECOMMENDS:

1. That the Commissioner reinstate the Petitioner, Monty R. Sinner, to his former position of school bus driver effective February 22, 2005;
2. That the Commissioner award back pay to Mr. Sinner from February 22, 2005, through the date of his reinstatement, together with interest thereon at the rate prescribed by law from the time that each paycheck was due;
3. That the Commissioner direct the District to continue paying Mr. Sinner as a bus driver, at the rate prescribed by the applicable bargaining agreement, until the School District has provided him with all of the rights to which he is entitled under the Veteran's Preference Act.

Dated: November 13, 2006

/s/Bruce H. Johnson

BRUCE H. JOHNSON
Assistant Chief Administrative Law Judge

Reported: Tape-recorded (Five tapes)

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Veterans Affairs will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions and Recommendation. The Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the office of Clark Dyrud, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, Saint Paul, MN 55155-2079, to find out how to file exceptions or present argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

The Commissioner of Veterans Affairs is required to serve his final decision upon each party and the Administrative Law Judge by first class mail.⁵⁶

MEMORANDUM

I. The Petitioner Acquiesced to Having a Combined Grievance and Veterans Preference Hearing on January 3, 2006.

The Petitioner was terminated for driving his school bus unsafely. He separately filed a grievance under his collective bargaining agreement and also requested that the School District provide him with the veterans preference hearing he was entitled to under Minn. Stat. § 197.46.

The evidence established that his Union representative, Ms. Brink, originally scheduled a combined grievance/veterans preference hearing for the Petitioner on October 18, 2005, without first obtaining the Petitioner's permission and agreement to have a combined hearing.⁵⁷ According to the evidence, the first indication that the Petitioner received that the October 18, 2006, hearing would be a combined hearing was a letter describing it as such that he received from the School District on September 13, 2005. The testimony of the Petitioner and his son suggests that the Petitioner was less concerned with having separate grievance and veterans preference hearings than with having his son, rather than his union representative, represent him in connection with his veterans preference claims.⁵⁸ As it turned out, both the Petitioner's son, Mike Sinner, and his union representative, Char Brink, were available to attend the October 18, 2005, hearing, and both did attend. The ALJ therefore concludes from the evidence that even though the Petitioner had never expressly agreed to have a combined hearing, on October 18, 2005, the Petitioner knew that the hearing was going to be a combined hearing and was prepared to address both his grievance and his veterans preference claims at that hearing because his son was there to assist him.

⁵⁶ Minn. Stat. § 14.62, subd. 1.

⁵⁷ See Findings Nos. 14, 15, and 16. Unfortunately, Ms. Brink died before the hearing in this proceeding could be conducted. There was therefore no evidence to contradict the Petitioner's version of many of his dealings with Ms. Brink.

⁵⁸ Testimony of Monty Sinner and Mike Sinner.

However, no hearing occurred on October 18, 2005. Before the hearing could begin, the parties entered into settlement discussions and reached a tentative settlement agreement.⁵⁹ Then, before the settlement could be completed, the Petitioner had second thoughts about it and rejected it.⁶⁰ Following the Petitioner's rejection of the proposed settlement, Ms. Brink, his union representative, had discussions with Mr. Rupp, the School District's counsel, about rescheduling the hearing. The Petitioner was not brought into those discussions, and Mr. Rupp and Ms. Brink arranged to have the arbitrator, Ms. Powers, available for a hearing on January 3, 2006. Ms. Brink did not tell the Petitioner that the hearing would be on that date until December 27th, only six days before the scheduled hearing date.⁶¹ The Petitioner then contacted his son, Mike, and asked him to come to the hearing to help him assert his veterans preference claims.⁶² If the Petitioner had not understood that the January 3rd hearing would be a combined hearing, there would have been no reason for him to ask his son to attend the hearing. In any event, Mike Sinner was scheduled to be out of the state on January 3rd and told his father that he would be unable to attend the hearing then.⁶³ Thereafter, the Petitioner contacted Ms. Brink and other Union staff and requested that the hearing be rescheduled to a later date. However, Union staff strongly pressured the Petitioner to go ahead with a combined hearing on January 3rd, and the Petitioner acquiesced.⁶⁴ It is also clear from the evidence that on January 3, 2006, Petitioner knew that the hearing that Arbitrator Powers was conducting was a combined hearing, and the Petitioner acquiesced by letting the hearing go forward.⁶⁵

II. The Petitioner's Veterans Preference Claims Were Never Adjudicated by Arbitrator Powers.

The Minnesota Arbitration Act, Minn. Stat. §§ 572.01 — .41, governs binding arbitration proceedings in Minnesota, including the proceeding that Arbitrator Powers conducted on January 3, 2006. Therefore, the interpretation and legal effect of that arbitration award is governed by those statutes.⁶⁶ In its opening statement, the School District presented two issues for Arbitrator Powers to adjudicate: (1) whether the School District had disciplined the Petitioner "for just cause" within the meaning of the applicable collective bargaining agreement; and (2) whether the Petitioner engaged in "misconduct," within the meaning of

⁵⁹ Finding No. 18.

⁶⁰ Finding Nos. 19 and 20.

⁶¹ Finding No. 21.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Findings Nos. 20 and 21.

⁶⁵ Findings Nos. 23, 24, and 25. The issue of whether the Petitioner's waiver of his right to have a separate veterans preference hearing was involuntary and the result of duress was neither raised nor argued in this proceeding. Moreover, for the reasons set forth in Part II of this Memorandum, it is unnecessary for the ALJ to consider that issue.

⁶⁶ *All Metro Supply, Inc. v. Warner*, 707 N.W. 2d 1 (Minn. App. 2005), *Crosby-Ironton Fed. of Teachers, Local 1325 v. Indep. Sch. Dist. No. 182*, *Crosby-Ironton*, 285 N.W.2d 667, 669 (Minn. 1979).

the Veterans Preference Act, that justified his removal from his position.⁶⁷ However, on its face, the arbitration award expressly states that Arbitrator Powers only addressed the first of those issues. The Arbitrator's decision states that there was only one issue: "Did the employer have just cause to terminate Grievant?"⁶⁸ Likewise, the statement of the award only addresses that same, single issue: "The grievance is denied."⁶⁹ It does not mention disposition of the veteran's preference issue. The ALJ also notes that Arbitrator's award sets forth the standard in the collective bargaining agreement that "[e]mployees will be disciplined only for just cause."⁷⁰ But nowhere does it refer to the Veterans Preference Act standards of "misconduct or incompetency" or purport to apply those standards to what the Arbitrator found to be the facts. In other words, although the issue of whether the School District's removal of the Petitioner from his position may have been submitted to Arbitrator Powers for decision, her award does not contain a decision on that issue.

Minnesota law does not permit consideration of extrinsic evidence in a collateral proceeding to interpret, clarify, or amend the express terms of an arbitration award.⁷¹ Here, the ALJ may not consider evidence outside of the terms of Arbitrator Powers' award in order to clarify the scope of her award.⁷² Minn. Stat. § 572.16 permits an arbitrator to clarify an award within 20 days after the delivery of the award to the parties,⁷³ and Minn. Stat. § 572.16 permits a district court to submit an award to the arbitrator for modification or correction within 90 days of its delivery.⁷⁴ But none of the parties sought that relief within the times specified by statute, and there is no provision in statute authorizing an administrative law judge to modify or clarify an arbitration award in a contested case proceeding under Chapter 14.⁷⁵

The School District argues that the award can be clarified to include the Veterans' Preference hearing by reference to case law that establishes a non-statutory basis for clarification or interpretation of arbitration awards, but none of the cases cited by the School District as authority are Minnesota cases. Rather, in *All Metro Supply, Inc. v. Warner*,⁷⁶ the Minnesota Court of Appeals expressly rejected the argument that there is a non-statutory basis for dealing with an ambiguous arbitration award.⁷⁷ Arbitrator Powers' award must be interpreted in the ways the Minnesota Arbitration Act and applicable appellate decisions provide.

⁶⁷ Finding No. 26.

⁶⁸ Finding No. 27.

⁶⁹ *Id.*

⁷⁰ Exs. 12 and T at p. 2.

⁷¹ *All Metro Supply, Inc., supra*, 701 N.W.2d at 5.

⁷² *All Metro Supply, Inc., supra*.

⁷³ Minn. Stat. § 572.16.

⁷⁴ *Id.*

⁷⁵ *All Metro Supply, Inc., supra*.

⁷⁶ *Supra*.

⁷⁷ *Id.*

Additionally, it is questionable whether Arbitrator Powers' award is even correctable or amendable by anyone as containing a "mistake" within the meaning of Minn. Stat. § 572.20, subd. 1(1). The Minnesota Supreme Court has interpreted the mistake standard to mean "technical errors and irregularities in the award that do not affect the merits."⁷⁸ The Court of Appeals has further described "mistake" as only consisting of errors that do not require consideration of evidence from outside of the award to determine the arbitrator's intent.⁷⁹ Here, the absence of express findings and conclusions relating to the Petitioner's veterans preference claim does not appear to constitute a "mistake" as that term is used in the Arbitration Act.

III. Conclusion

For the reasons set forth above, the ALJ concludes that the arbitration proceeding that Arbitrator Powers conducted on January 3, 2006, and her ensuing award fell short of the hearing to which the Petitioner was entitled under Minn. Stat. § 197.46. The ALJ therefore recommends that the Commissioner reinstate Monty Sinner to his position of a school bus driver for the School District and order the District to give him back pay until it has provided him with all of the rights to which he is entitled under the Veteran's Preference Act.

B.H.J.

⁷⁸ *Int'l Union of Elec. & Mach. Workers of Am. Local 1140 v. Portec, Inc.*, 303 Minn. 341, 346, 228 N.W. 2d 239, 243 (1975).

⁷⁹ *All Metro Supply, Inc.*, *supra*.